Hamelink & Van den Tooren
Tax Lawyers

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newsletter

On 15 September 2015, the Dutch government published tax bills containing legislative amendments to the Dutch tax laws as part of the budget for the year 2016. This newsletter summarizes the most important proposed measures for the international tax practice. It should be noted that these proposals will be further discussed in parliament and may be subject to change.

Implementation amendments EU Parent-Subsidiary Directive

As per 1 January 2016, new anti-abuse rules in the Dutch Corporate Income Tax ("CIT") Act and Dividend Tax Act should enter into force implementing amendments to the EU Parent-Subsidiary Directive. It is proposed to introduce amendments to (i) the Dutch participation exemption/participation credit system; (ii) the Dutch CIT rules for qualifying non-Dutch corporate shareholders of Dutch companies; and (iii) the dividend withholding tax exemption for cooperatives ("Coops"). The new rules are not limited to EU and EEA (European Economic Area) situations.

(i) Dutch participation exemption/participation credit system

Based on the proposed legislative amendments, the Dutch participation exemption and participation credit system shall no longer apply to remunerations and payments from qualifying participations insofar these remunerations and payments can directly or indirectly, legally or in fact, be deducted from the participations' profit tax base. This means that even in situations where the remuneration or payment is non-deductible at the level of the participation (e.g. because of the application of an interest deduction restriction rule), the remuneration or payment can be taxable in the Netherlands. Taxpayers making use of hybrid financing arrangements should consider restructuring these arrangements to avoid double taxation. It should furthermore be noted that remunerations and payments received after 1 January 2016 will fall within the scope of the new rules (i.e. it is irrelevant to which year the remuneration or payment relates).

(ii) Dutch CIT rules for qualifying non-Dutch corporate shareholders

Currently, a non-Dutch corporate shareholder can become subject to CIT on income (including dividends and capital gains) derived from an interest of at least 5% (a "Substantial Interest") in a Dutch resident company if:

1. The non-Dutch corporate shareholder owns the Substantial Interest with the primary or one of the primary reasons to avoid personal income or dividend tax from another party; and
2. The Substantial Interest cannot be allocated to a business enterprise of the non-Dutch corporate shareholder.

The legislative proposal seeks to amend the second condition as follows:

> *"It concerns an artificial construction or series of constructions. A construction will be considered artificial when it is not established based on valid business reasons reflecting economic reality".*

From the explanatory notes, it can be derived that the main change of the proposed amendment relates to the situation of an active group which holds a Substantial Interest in a Dutch company via a passive intermediate holding company. In order to avoid application of the amended anti-abuse rule for non-Dutch corporate shareholders, the passive intermediate holding company should meet certain minimum substance requirements.

(iii) Dividend withholding tax exemption for Coops

Based on the Dividend Tax Act, dividends distributed by Dutch Coops are subject to dividend tax under similar conditions as those under which qualifying non-Dutch corporate shareholders may be subject to CIT (we refer to item (ii) above). The proposed amendments with respect to the dividend withholding tax exemption for Coops are in line with the proposed amended anti-abuse rule for qualifying non-Dutch corporate shareholders.

STEP-UP FOR DIVIDEND TAX PURPOSES FOR CROSS-BORDER (DE)MERGERS

A new provision in the Dividend Tax Act is proposed pursuant to which a step-up is provided in case of a cross border (de)merger into a Dutch company. This implies that the paid-up capital of the Dutch company will be increased by an amount equal to the fair market value of the transferred equity (i.e. net assets with an exception for shares in a Dutch company). No step-up is provided if the (de)merger is aimed at avoidance or deferral of taxation.

COUNTRY-BY-COUNTRY-REPORTING AND INCREASED TRANSFER PRICING DOCUMENTATION OBLIGATIONS FOR (LARGE) MULTINATIONALS

In line with model legislation issued by the OECD, as per 1 January 2016, increased information obligations for (large) multinationals should enter into force. The proposed new rules introduce the obligation to prepare and file a "country-by-country report" and a "master file" together with a "local file" are introduced. The country-by-country report should be prepared by (i) Dutch top holding companies of a multinational group with a consolidated turnover of at least € 750 million; or (ii) Dutch companies or permanent establishments which are part of such group if the Netherlands did not receive the report from the jurisdiction in which the top holding company of the group is resident. The master file and the local file should be prepared by Dutch companies which are part of an international group with a consolidated turnover of at least € 50 million.

EMIGRATION OF DUTCH INDIVIDUALS OWNING A SUBSTANTIAL INTEREST

From the publishing date of the proposals onwards (i.e. 15 September 2015), new rules are proposed to apply to any Dutch resident individual who emigrates from the Netherlands whilst holding a Substantial Interest in a Dutch company. Under the old rules, by imposing a precautionary assessment, the emigrating individual received a non-collectable Personal Income Tax ("PIT") assessment for the unrealized gain on the Substantial Interest. However, the precautionary assessment was not collected until the taxpayer (whilst living abroad) disposed of his Substantial Interest or received (virtually all) the profits present in the company. Moreover, under the old rules, the precautionary assessment was waived after a period of ten years.

The following changes are now proposed:

- The precautionary assessment imposed upon emigration remains in place indefinitely.
- Dividends and capital gains derived by the shareholder from the Dutch company reduce the amount of the precautionary assessment and are now immediately subject to 25% PIT.
- If the tax residency of the Dutch company will be transferred outside the Netherlands, the company will be deemed to remain resident of the Netherlands until the precautionary assessment has been fully paid. This is a technical rule to ensure that the Netherlands retains its taxing rights on the PIT under the new rules.

Please note that the 'old rules' as mentioned above should in any case remain applicable to emigrations that took place prior to 15 September 2015.

Should you have any questions on the above, please contact your regular advisor at Hamelink & Van den Tooren at + 31 70 310 50 70 or + 31 20 333 92 80.